

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-463

NATHAN DARNELL ARMSTRONG
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered NOVEMBER 19, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SECOND DIVISION
[NO. CR 07-1469]

HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Nathan Darnell Armstrong was convicted in a jury trial of aggravated robbery and theft of property. He was sentenced to a total of seventeen years in prison, which included an enhancement for employing a firearm while committing the offenses. Mr. Armstrong's sole argument on appeal is that the trial court erred in denying his motion for directed verdict because the State failed to sufficiently corroborate the testimony of his accomplice, Antony Kelly. We affirm.

A person commits aggravated robbery if, with the purpose of committing a theft, the person employs or threatens to immediately employ physical force upon another person while armed with a deadly weapon. Ark. Code Ann. § 5-12-103(a)(1) (Repl. 2006). A person commits theft of property if he knowingly takes unauthorized control over the

property of another person with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006).

An appeal from a denial of a motion for directed verdict is a challenge to the sufficiency of the evidence. *Winston v. State*, 372 Ark. 19, __ S.W.3d __ (2007). Reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict was supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if, when viewed in the light most favorable to the State, it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000).

The victim in this case was Amber Peaster. Ms. Peaster testified that on February 8, 2007, she was working the graveyard shift (10:00 p.m. to 7:00 a.m.) at a Little Rock Wal-Mart. On her work break at 2:00 a.m., Ms. Peaster decided to drive home. As she was walking toward the door to go to her car, Antony Kelly approached and asked her if she would give him and his brother a ride around the corner. Ms. Peaster knew Mr. Kelly from his employment with Wal-Mart, and she agreed to give the two men a ride.

When Ms. Peaster and Mr. Kelly walked outside the store, Mr. Armstrong walked up to them and Mr. Kelly introduced him as his brother, although Mr. Kelly did not call Mr. Armstrong by name. Before then, Ms. Peaster had never met Mr. Armstrong. Ms. Peaster indicated that when she was introduced to appellant they were underneath bright lights that were just outside the door.

Ms. Peaster proceeded to her car, and Mr. Kelly got into the front passenger's seat while Mr. Armstrong sat in the rear passenger's seat. Mr. Kelly directed Ms. Peaster to a certain location and then asked her to drop them off, which she did. According to Ms. Peaster, Mr. Kelly exited the vehicle and shut his door, and Mr. Armstrong opened his door but did not exit. Ms. Peaster knew that Mr. Armstrong remained in the car because the interior light stayed on, and when she turned to the back seat to see what was taking him so long, Mr. Armstrong pointed a gun in her face and demanded money. Ms. Peaster at first said that she did not have any money, but after Mr. Armstrong threatened to shoot her she handed him about \$150.00. She testified that this encounter lasted about three minutes, and that after receiving the money Mr. Armstrong finally got out of the car and shut the door. Ms. Peaster then drove back to her apartment, where the police were called. Ms. Peaster subsequently spoke to the police and described what had happened.

A couple of months after the crime, Ms. Peaster was called to the police station and identified Mr. Armstrong out of a six-man photographic lineup. Ms. Peaster testified at trial, "That is the same person that robbed me that night of February the eighth. I am a hundred percent sure. There is no doubt in my mind."

Antony Kelly, who was awaiting trial for his participation in the crimes, also testified as a witness for the State. Mr. Kelly testified that he had been acquainted with Mr. Armstrong for two weeks before the date of the robbery, and that on that night they were at Wal-Mart playing video games. According to Mr. Kelly, Mr. Armstrong said he wanted to rob someone that night, and that if Mr. Kelly did not go along with it,

Mr. Armstrong would kill him and his family. Mr. Kelly acknowledged that while inside Wal-Mart he asked Ms. Peaster to give him and his brother a ride.

Mr. Kelly introduced Mr. Armstrong as his brother and they rode off with Ms. Peaster. Mr. Kelly testified that, after Ms. Peaster stopped the car, he got out and closed the door. He then saw Mr. Armstrong pull a gun on Ms. Peaster and threaten to kill her if she refused to give him money. Mr. Kelly acknowledged that after the robbery was completed, he unsuccessfully asked Mr. Armstrong for some of the money. He further admitted that he lied in a statement he gave to the police in an attempt to minimize his involvement in the crimes.

The defense produced two witnesses who both testified that they saw Mr. Kelly at the Wal-Mart on the night of the robbery, and that the man he was with was not Mr. Armstrong. The defense also elicited testimony from James Austin, who maintained that Mr. Armstrong was with him drinking and playing basketball from about 11:30 p.m. until 3:00 a.m. on the night of the robbery. Appellant's mother corroborated this fact and testified that she picked up Mr. Armstrong at Mr. Austin's house at about 3:00 a.m.

Mr. Armstrong testified on his own behalf. He stated that he was playing basketball with Mr. Austin at the time of the alleged robbery. Mr. Armstrong admitted that he knows Mr. Kelly and that he spoke with Mr. Kelly on the telephone about an alleged robbery while Mr. Kelly was at Wal-Mart. However, Mr. Armstrong denied being at Wal-Mart that night or having any involvement with the robbery.

On appeal, Mr. Armstrong argues that his directed-verdict motion should have been granted because there was insufficient evidence to corroborate his accomplice's testimony as required by Ark. Code Ann. § 16-89-111(e)(1)(A) (Repl. 2005), which provides:

A conviction or an adjudication of delinquency cannot be had in any case of felony upon the testimony of an accomplice, including in the juvenile division of circuit court, unless corroborated by other evidence tending to connect the defendant or the juvenile with the commission of the offense.

In *Hogue v. State*, 323 Ark. 515, 915 S.W.2d 276 (1996), the supreme court held that the corroboration of the accomplice's testimony must be sufficient standing alone to establish the commission of the offense and to connect the defendant with it.

Mr. Armstrong asserts that, other than the testimony of Mr. Kelly, the State relied on Ms. Peaster's testimony as proof of his guilt. Mr. Armstrong acknowledges that Ms. Peaster identified him as the culprit, and that as a general rule witness credibility is a matter for the jury to decide. *See, e.g., Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). However, he relies on *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002), where the supreme court held that after a jury has given credence to a witness's testimony, the appellate court does not disregard it unless it was so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. In the present case, Mr. Armstrong contends that Ms. Peaster's testimony was inherently improbable and clearly unbelievable because when she gave a description of the gunman to the police on two separate occasions, she failed to mention three of his immediately identifiable and unmistakable physical characteristics: a facial scar, a "lazy eye," and a missing tooth. Mr. Armstrong submits that in light of this the trial court should have disregarded

Ms. Peaster's testimony, and that without her testimony there was insufficient corroboration of his accomplice's identification of him as the person who committed the robbery and theft.

As the State argues in its brief, the challenge to the sufficiency of the evidence being raised in this appeal is not preserved for review. A party cannot change the grounds for a directed verdict on appeal, but is bound by the scope and nature of the argument presented at trial. *Avery v. State*, 93 Ark. App. 112, 217 S.W.3d 162 (2005). The requirement that a defendant make a specific directed-verdict motion extends to any challenge to the sufficiency of the evidence corroborating an accomplice's testimony, and the failure to challenge the sufficiency of accomplice-corroboration evidence in a directed-verdict motion at trial precludes appellate review on that ground. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005).

At the close of the State's case, appellant's counsel stated, "Your honor, the State has rested, and we would move for directed verdict based on sufficiency of evidence as to counts one and two, and as to the firearm enhancement." At the close of all the evidence, appellant's counsel stated:

Defense moves for a directed verdict based upon insufficiency of the evidence and that the State's own eye witness admits to being a liar on the stand, and based upon the victim's identification which is at best spotty, we would move for directed verdict, and argue that they have not met their burden of proof, beyond a reasonable doubt.

Because appellant failed to specifically raise the issue of the sufficiency of the evidence corroborating his accomplice's testimony when he made his motions for directed verdict, he has waived that issue for purposes of appeal.

Moreover, contrary to Mr. Armstrong's argument, there was substantial evidence to support his convictions. The fact that Ms. Peaster failed to note in detail every physical characteristic of Mr. Armstrong in her conversations with the police did not render her testimony inherently improbable or clearly unbelievable. In her testimony, Ms. Peaster established that she met Mr. Armstrong face-to-face in a well lit parking lot, and then had a face-to-face encounter lasting three minutes in her car with the interior light on. Based on these opportunities to view her assailant, Ms. Peaster subsequently selected Mr. Armstrong from a photographic lineup. At trial, she testified that she was "a hundred percent sure" and that there was "no doubt in my mind" that appellant was the person who robbed her that night. One eyewitness's testimony may be sufficient to sustain a conviction, and it is not clearly unbelievable simply because it is uncorroborated or because it has been impeached. *Williams v. State, supra*. In the present case, Ms. Peaster's testimony was not only sufficient corroboration of the accomplice testimony. It was alone sufficient to sustain Mr. Armstrong's convictions.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.